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Habeas Corpus: The Bulwark of Our Liberties by the U.S. Supreme Court

...We begin with a brief account of the history and origins of the writ. Our account proceeds from two propositions. First, protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause. Second, to the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases.

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchical power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.

Magna Carta decreed that no man would be imprisoned contrary to the law of the land. (“No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.”) Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled.

The development was painstaking, even by the centuries-long measures of English constitutional history. The writ was known and used in some form at least as early as the reign of Edward I. Yet at the outset it was used to protect not the rights of citizens but those of the King and his courts. The early courts were considered agents of the Crown, designed to assist the King in the exercise of his power. Thus the writ, while it would become part of the foundation of liberty for the King’s subjects, was in its earliest use a mechanism for securing compliance with the King’s laws. Over time it became clear that by issuing the writ of habeas corpus common-law

courts sought to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner.

Even so, from an early date it was understood that the King, too, was subject to the law. As the writers said of Magna Carta, "it means this, that the king is and shall be below the law." ("The king must not be under man but under God and under the law, because law makes the king.") And, by the 1600's, the writ was deemed less an instrument of the King's power and more a restraint upon it.

Still, the writ proved to be an imperfect check. Even when the importance of the writ was well understood in England, habeas relief often was denied by the courts or suspended by Parliament. Denial or suspension occurred in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them.

A notable example from this period was *Darnel's Case*. The events giving rise to the case began when, in a display of the Stuart penchant for authoritarian excess, Charles I demanded that Darnel and at least four others lend him money. Upon their refusal, they were imprisoned. The prisoners sought a writ of habeas corpus; and the King filed a return in the form of a warrant signed by the Attorney General. The court held this was a sufficient answer and justified the subjects' continued imprisonment.

There was an immediate outcry of protest. The House of Commons promptly passed the Petition of Right, which condemned executive "imprison[ment] without any cause" shown, and declared that "no freeman in any such manner as is before mencioned [shall] be imprisoned or detained." Yet a full legislative response was long delayed. The King soon began to abuse his authority again, and Parliament was dissolved. When Parliament reconvened in 1640, it sought to secure access to the writ by statute. The Act of 1640 expressly authorized use of the writ to test the legality of commitment by command or warrant of the King or the Privy Council. Civil strife and the Interregnum soon followed, and not until 1679 did Parliament try once more to secure the writ, this time through the Habeas Corpus Act of 1679. The Act, which later would be described by Blackstone as the "stable bulwark of our liberties," established procedures for issuing the writ; and it was the model upon which the habeas statutes of the 13 American Colonies were based.

This history was known to the Framers. It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty. Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles.

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” The word “privilege” was used, perhaps, to avoid mentioning some rights to the exclusion of others. (Indeed, the only mention of the term “right” in the Constitution, as ratified, is in its clause giving Congress the power to protect the rights of authors and inventors.)

Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme. In a critical exchange with Patrick Henry at the Virginia ratifying convention Edmund Randolph referred to the Suspension Clause as an “exception” to the “power given to Congress to regulate courts.” A resolution passed by the New York ratifying convention made clear its understanding that the Clause not only protects against arbitrary suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention.

Alexander Hamilton likewise explained that by providing the detainee a judicial forum to challenge detention, the writ preserves limited government. As he explained in *The Federalist* No. 84:

[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone ... are well worthy of recital: “To bereave a man of life ... or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.” And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls “the *bulwark* of the British Constitution”....

*This is an excerpt from the majority opinion in *Boumediene v. Bush*, which was decided this past June. Citations to books and articles have been removed to facilitate reading. For the complete opinion of the Court, including citations, see: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=06-1195>.*

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